



BRB No. 16-0616

WAYNE R. LONG)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>May 25, 2017</u>
)	
Self-Insured Employer)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Matthew W. Boyle (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (2015-LHC-01973) of Administrative Law Judge Timothy J. McGrath rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back on March 15, 1989, during the course of his employment as a sheet metal worker. Claimant transferred to a draftsman position on May 29, 1994, because of restrictions related to his work injury. In a 2001 decision, Administrative Law Judge Tierney awarded claimant compensation for various periods of permanent partial disability, 33 U.S.C. §908(c)(21), beginning on May 31, 1994, a two-day period of permanent total disability, 33 U.S.C. §908(a), and continuing permanent partial disability from June 4, 1995, based on his average weekly wage of \$581.63, and a corresponding compensation rate of \$387.75. Employer was found entitled to Section 8(f) relief, 33 U.S.C. §908(f), commencing May 29, 1996.

On November 24, 2014, claimant’s treating physician, Dr. Maletz, opined that claimant was unable to perform his job duties, and claimant stopped working. CX 3 at 1-2. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from November 24, 2014. EX 3. Claimant sought Section 22 modification, 33 U.S.C. §922, contending he is entitled to continuing compensation for permanent total disability. Prior to the hearing, claimant and employer stipulated to all relevant facts and issues. JX 1. The Director declined to join the parties’ stipulations. In his decision, Administrative Law Judge McGrath (the administrative law judge) found employer’s evidence of suitable alternate employment unconvincing, and he awarded claimant compensation for permanent total disability from November 25, 2014. Decision and Order at 3. The administrative law judge stated the award is payable by the Special Fund at a weekly compensation rate of \$724, with annual Section 10(f) adjustments, 33 U.S.C. §910(f), thereafter. *Id.* at 4.

On appeal, the Director challenges the award of a weekly compensation rate of \$724. The Director contends this rate erroneously includes all Section 10(f) adjustments occurring since Fiscal Year (FY) 1995. The Director contends that Section 10(f) adjustments apply only after a claimant becomes entitled to benefits for permanent total disability. Claimant filed a motion to dismiss the Director’s appeal and a response brief in support of the administrative law judge’s award. The Director opposes claimant’s motion to dismiss and filed a reply brief in support of his appeal.

Claimant’s motion to dismiss is based on the Director’s failure to raise the Section 10(f) issue before the administrative law judge. Claimant contends the Director cannot raise this issue for the first time on appeal. We disagree for two reasons. First, it is well-established that the Director may present an argument raising a legal challenge to an administrative law judge’s determination for the first time before the Board, regardless of whether he participated below, especially when, as here, the liability of the Special Fund is at issue. *See Anderson v. Yusen Terminals, Inc.*, 50 BRBS 23 (2016); *Stewart v. Bath*

Iron Works Corp., 25 BRBS 151 (1991); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 81 (1989). The administrative law judge's application of Section 10(f) annual adjustments presents a question of law. See *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc); see also *Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001). Second, the Director declined to join the private parties' stipulations because they agreed to a compensation rate that included intervening Section 10(f) adjustments. See Letter dated March 9, 2016; see generally *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993) (the private parties cannot bind the Special Fund by stipulation absent agreement of the Director). Thus, the issue was arguably raised before the administrative law judge. Accordingly, we deny claimant's motion to dismiss.

The Director contends that the administrative law judge erred by including Section 10(f) increases for the years prior to claimant's work-related disability becoming permanent and total. The Director states that the correct permanent total disability compensation rates are \$387.75 per week, when claimant's permanent total disability began on November 25, 2014, and, pursuant to Section 10(f), \$396 for FY 2016, and \$405 for FY 2017. We agree.

Section 10(f) of the Act provides:

(f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of--

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

33 U.S.C. §910(f) (emphasis added). In *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit adopted the Director's method for computing permanent total disability benefits and held that claimants, upon becoming permanently totally disabled, are entitled to intervening annual cost-of-living adjustments pursuant to Section 10(f) that accrued during any earlier period of temporary total disability. *Holliday*, 654 F.2d at 417, 421-423, 13 BRBS at 741-742, 746-747; see also *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986).

Subsequently, in *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc), the Fifth Circuit, sitting en banc, overruled its decision in *Holliday* and held that claimants are not entitled to Section 10(f) adjustments that occurred during previous periods of temporary total disability. In overruling *Holliday*, the Fifth Circuit concluded that the language of Section 10(f) is plain and unambiguous that the annual adjustments are to be paid only to permanent total disability benefits. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38(CRT). Moreover, although the court stated that resort to legislative history is unnecessary “where the statute is so lucid,” it nonetheless noted that, with regard to Section 10(f), Congress intended to provide for upgrading benefits in future years only in cases of permanent total disability and had rejected a version of Section 10(f) providing for annual adjustments to all compensation, whether partial or total, temporary or permanent. *Id.* at n.3. Consequently, the court adopted the position of the Director that, upon reaching permanent total disability, Section 10(f) adjustments for prior periods of temporary total disability are not included in the compensation rate. *Phillips*, 895 F.2d at 1035, 23 BRBS at 38(CRT); *see, e.g., Scott v. Lockheed Shipbuilding & Constr. Co.*, 18 BRBS 246 (1986). The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, as well as the United States Court of Appeals for the Ninth Circuit, subsequently adopted the holding in *Phillips*.¹ *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990); *see also Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990); *Bailey v. Pepperidge Farm, Inc.*, 32 BRBS 76 (1998). The *Lozada* court stated, “We find the reasoning of the *Phillips* court persuasive and adopt its rule.” *Lozada*, 903 F.3d at 170, 23 BRBS at 81(CRT).

As *Lozada* is controlling precedent in this Second Circuit case, we hold that the administrative law judge erred in awarding claimant compensation at a rate that incorporated Section 10(f) adjustments prior to the date claimant’s disability was adjudged permanent and total. We reject claimant’s contention that this case is distinguishable because he was receiving permanent partial disability compensation, rather than temporary total disability compensation, before becoming entitled to compensation for permanent total disability. The applicability of Section 10(f) derives from the plain language of the statute and not by the type of disability preceding the onset of permanent total disability. While claimant highlights the unfairness of receiving permanent total disability compensation in 2014 based on the compensation rate he received for temporary total disability in 1989, we are not empowered to overrule unambiguous statutory language based on equitable considerations, but must adhere to

¹ Cf. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT), *reh’g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998); *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (adhering to *Holliday* because it was decided prior to October 1, 1981, when the Eleventh Circuit was created).

the plain meaning of the statute.² See generally *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Andrepoint v. Murphy Exploration & Prod. Co.*, 566 F.3d 415, 43 BRBS 27(CRT) (5th Cir. 2009). Accordingly, we vacate the administrative law judge's permanent total disability compensation rate of \$724, and we modify his decision to provide a compensation rate for permanent total disability of \$387.75 from November 25, 2014, subject to annual Section 10(f) adjustments thereafter. 33 U.S.C. §§908(a) (compensation rate of two-thirds of the claimant's average weekly wage); 910(f).

Accordingly, the administrative law judge's award of permanent total disability compensation from November 25, 2014, at a weekly rate of \$724, is vacated. The award is modified to a rate of \$387.75, subject thereafter to annual Section 10(f) adjustments. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

² Claimant avers he is disadvantaged because he went back to work for many years, whereas, had he been permanently totally disabled since reaching maximum medical improvement, he would have received the benefit of many years of Section 10(f) adjustments. This contention was acknowledged by the concurring opinion in *Bowen v. Director, OWCP*, 912 F.2d 348, 351-352, 24 BRBS 9, 13-15(CRT) (9th Cir. 1990), but the judge stated that the result therein was "legally compelled" by the plain language of the statute.